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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-884

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MAX J. GORDON,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI

MURRAY, PATTERSON & SHARPE,
Attorneys for Defendant-Petitioner,
445 Park Avenue—Suite 304
New York, New York 10022
212-832-2323

Of Counsel:
William E. Murray
ARCHIBALD A. PATTERSON

SUPREME COURT

OF

THE UNITED STATES

UNITED STATES OF AMERICA)

Plaintiff-Respondent)

v.)

MAX J. GORDON)

Defendant-Petitioner)

PETITION FOR WRIT OF CERTIORARI

(a) NO OPINIONS WERE WRITTEN OR DELIVERED IN THE COURTS BELOW WITH RESPECT TO THE DECISIONS.

(b) JURISDICTION OF THIS COURT IS INVOKED UPON THE FOLLOWING GROUNDS:

(i) The judgment sought to be reviewed is the judgment of the United States Court of Appeals for the Second Circuit dated and entered November 16, 1972.

(ii) There is no order with respect to rehearing or extension of time to petition for certiorari.

(iii) Jurisdiction of this court to review the judgment in question by writ of certiorari is conferred by Title 28 of the United States Code Section 1254 Subdivision 1.

(c) THE QUESTION PRESENTED FOR REVIEW

The sole question presented by this petition is: Can a person be guilty of the felony of violating Section 2231 of Title 18 of the United States Code by interfering with a person executing a search warrant if the accused has no intention of opposing, impeding or interfering with the search?

The defendant petitioner herein, clad in pajamas, opened the door of an apartment of a woman tenant to whom he was not related. Standing outside were the apartment superintendent and four officers armed with a search warrant. Defendant rushed out, trying to dodge or slip by them but bumping into them and pushing one of them against the wall of the hall before he was handcuffed.

The trial Judge charged the jury that there were only two necessary elements of proof of the crime: first, that the defendant forcibly opposed or impeded, etc., the agents, and second, that they were engaged in performing their official duties. The Judge did not require that the jury find that the defendant intended to impede the search or that he intended to impede the officers in entering and searching, and the circumstances as shown by the prosecution's evidence were clearly consistent with the possibility that the defendant was simply trying to get away. The search warrant was with respect to the possibility that the apartment was used for illegal gambling but the warrant was not directed to the defendant, it was not his apartment, he was neither the tenant nor a resident, and in fact no evidence of gambling was found and there was nothing improper in the apartment, except possibly the defendant himself because he was dressed only in pajamas.

Basically, the Judge's charge was the type of charge that would support an indictment under Section 111 of Title 18 of the United States Code, interference with officers engaged in performance of their official duties. However, this indictment was not under that section but under Section 2231, which makes it a felony to interfere with persons in the course of executing search warrants only if the interference is "with regard thereto", language which is not contained in Section 111, and has no counterpart therein.

(d) THE STATUTE INVOLVED - UNITED STATES CODE, TITLE 18, SECTION 2231

"Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both". (United States Code Annotated, Title 18, page 465).

(e) STATEMENT OF THE CASE

The basis for federal jurisdiction is the alleged violation of a federal statute, Section 2231 of Title 18 of the United States Code.

On February 28, 1972, the defendant-petitioner (hereinafter called defendant) was indicted under Title 18 of the United States Code Section 2231 for resisting, etc., special agents of the Federal Bureau of Investigation in the course of executing a search warrant. Defendant moved to dismiss the indictment and on May 15th the motion was denied and the jury trial was commenced on June 5th and continued June 8th and 9th, 1972 resulting in a verdict of guilty and on July 7th the defendant was sentenced to imprisonment for six months.

The judgment was appealed to the Court of Appeals for the Second Circuit and on November 16, 1972 the judgment was affirmed without opinion.

The relevant facts are: A warrant was issued (Page 28 of Appendix to Brief, hereafter cited simply by page numbers) to search for evidence of illegal gambling in an apartment leased and occupied by one Mrs. Lambert (p. 100, 101). On New Year's Day 1972 three special agents of the Federal Bureau of Investigation and a Connecticut State Trooper accompanied the Superintendent to the door of the apartment which is at the end of a hall (p. 39); the Superintendent rang the bell and called (p. 19) and the defendant, who is not related to the tenant, Mrs. Lambert, answered the door, opened it, clad in pajamas and apparently having just awakened (p. 23-26). He opened the door part way, (p.30) one of the agents put his foot in the door (p.47) and the defendant emerged either being brought out by the agents (p.21), or trying to dodge or slip by the agents (p.49). A "scuffle" ensued thus: Defendant tried to "slip through" agents Stonko and McGorray (Stonko, p. 49), he "continued running" past them (Long, p. 81), "brushing into" Trooper Maloney's arm (Maloney, p.99), and ended up in an arm lock by Agent Long and a head lock by Trooper Maloney (Maloney, p. 99), approximately five seconds after the door was opened (Long, p. 87-88). The defendant was promptly subdued and handcuffed (P. 77-78) and the agents promptly searched the apartment without finding any indicia of gambling (p.69-71, 116-119). Agent Stonko testified that after "the initial difficulty...when Mr. Gordon first opened the door" there was no reason why the officers couldn't get into the apartment to search it (p.52-3).

(g) THE BASIS FOR FEDERAL JURISDICTION

Jurisdiction is based on an indictment for violation of Section 2231 of Title 18 of the United States Code.

(h) THE REASONS FOR ALLOWING THE WRIT

This is a question of interpretation of a federal statute of general application which this court has never passed upon. The interpretation of the courts below is clearly erroneous and contrary to a reading of the statute involved, United States Code, Title 18 Section 2231.

The record indicates that the defendant was trying to get away, not that he was trying to prevent the search of the apartment. If the jury had been required to find that the defendant's interference with the agents was "with regard to" their search, it is clearly possible, if not probable that he would have been acquitted. However, the Judge's charge stated that the crime set forth in Section 2231 included only two elements: 1. interference with the agents, and 2. that they were engaged in the performance of their duty of executing the warrant.

By eliminating the requirement that the interference must be, as the statute requires "with regard to" the search, the court clearly created a new felony which Congress never enacted.

The error is clearly shown by a comparison of Section 111 and Section 2231 which are substantially similar but differ in certain respects, Section 111 referring to certain public officers (principally police) and Section 2231 covering assaults and interference with persons authorized to execute search warrants.

The two sections read:

Section 111	Section 2231
(a)	(a)
Whoever forcibly assaults resists, opposes, impedes, intimidates, or interferes with	Whoever forcibly assaults resists, opposes, prevents, impedes, intimidates, or interferes with
(b)	(b)
any person designated in Section 1114 of this title	any person authorized to serve or execute search warrants or to make searches and seizures
(c)	(c)
while engaged in or on account of the performance of his official duties	while engaged in the performance of his duties with regard thereto or on account of the performance of such duties
(d)	(d)
shall be fined not more than $5,000 or imprisoned not more than three years, or both.	shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(underscoring supplied)

It will be seen from the above that if either a policeman or a person executing a search warrant is at any time assaulted because they had performed their police duties or search duties this would be feloneous even though the assault occurred long afterwards. That situation is covered by the words in each section "on account of" such performance. Furthermore, under Section 111 any assault or interference with a policeman while engaged in his duties is a crime even though the assault or interference is not directed against the policeman's performance of police duties. However, Congress clearly restricted the felony of interfering with

persons executing search warrants to assaults or interference "with regard thereto". The courts below completely disregarded this statutory language in the instant case. The judgment below, therefore, improperly created a felony which Congress never created.

This court should not permit the creation of a new crime by judicial fiat or inadvertance.

Respectfully submitted,

MURRAY, PATTERSON & SHARPE
Attorneys for Defendant-
Petitioner
445 Park Avenue - Suite 304
New York, New York 10022
212-832-2323

Of Counsel:

Archibald A. Patterson

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November, one thousand nine hundred and seventy-two.

Present: HON. J. JOSEPH SMITH
HON. IRVING R. KAUFMAN
HON. WILLIAM H. MULLIGAN
Circuit Judges,

United States of America,	:	
Plaintiff-Appellee,	:	72-1962
v.	:	
Max J. Gordon,	:	
Defendant-Appellant.	:	

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED, NOVEMBER 16, 1972
A. DANIEL FUSARO, CLERK Cal. No. 360

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-884

MAX J. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of having assaulted agents of the Federal Bureau of Investigation who were executing a search warrant, in violation of 18 U.S.C. 2231. He was sentenced to six months' imprisonment. The court of appeals affirmed without opinion.

At about 2:45 p.m. on January 1, 1972, three agents of the Federal Bureau of Investigation and a Connecticut state trooper went to an apartment in Bridgeport, Connecticut, for the purpose of executing a search warrant for gambling paraphernalia at the apartment, then rented to a Dolores Lambert (Tr. 8,

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26–27, 29, 34). At the apartment building, the four officers went to the superintendent's office and from there went with the superintendent to Mrs. Lambert's sixth floor apartment (Tr. 7, 29, 53, 67). When the superintendent, Charles Pinchot, rang the door bell, petitioner called from inside asking who was there. Pinchot stated that it was "Charlie." After a pause, petitioner told Mrs. Lambert that Charlie was at the door, but did not open the door. After a second request, the door opened (Tr. 9). Pinchot then stepped aside and agent Stonko, who was wearing his badge on the lapel of his coat, immediately identified himself to petitioner as an agent of the Federal Bureau of Investigation and told petitioner that he had a search warrant for Mrs. Lambert's apartment (Tr. 10, 30, 54, 69, 87).

As soon as Stonko had identified himself and his purpose, petitioner began to close the door by placing the weight of his body against the door. Agents Stonko and McGorray lunged against the door in order to keep it open and after a brief struggle, the door suddenly flew open. Thereupon, petitioner came charging out in a crouched position with his clenched fists and elbows in front of him. Petitioner grabbed at the search warrant in Stonko's hand as he "crashed" into Stonko and McGorray, knocking them out of the doorway and into the hallway, cutting Stonko's hand. As petitioner passed by Stonko and McGorray he ran into agent Long and trooper Maloney with whom he struggled for about thirty seconds before they were able

to subdue him (Tr. 31–33, 54–55, 69–71, 88–89). Petitioner was then taken back into Mrs. Lambert's apartment and the search was conducted (Tr. 56, 71, 89).

As part of his instructions, the trial judge read the statute (18 U.S.C. 2231) and the indictment (2 Tr. 27–28). He told the jury that F.B.I. agents were empowered to make seizures under warrants (18 U.S.C. 3107) and that, in certain circumstances, an officer executing a warrant could break a door (18 U.S.C. 3109). He instructed the jury that in order to find the defendant guilty, the government must prove beyond a reasonable doubt the following two elements (2 Tr. 29):

> One, that the defendant, Max J. Gordon, on January 1, of this year, forcibly assaulted, resisted, or opposed, or impeded, or intimidated, or interfered with any or all of the three Federal Agents named in the indictment. That is Edward Stonko, Thomas McGorray and William Long. Two, at the time the agent, or agents was, or were, engaged in the performance of his, or their, official duties, but bear in mind that it is for you to note that the person or persons that he allegedly assaulted or impeded was, or were, Federal officers.

Petitioner's sole contention is that 18 U.S.C. 2231 requires an intent to oppose, impede or interfere with the search rather than with the agents themselves. He argues that there was no showing here that he intended to impede the search, and that the trial judge erred in failing to instruct the jury on this

element of the offense. This contention is without merit.

Section 2231 makes it a crime forcibly to assault, resist, or impede any person authorized to execute search warrants "while engaged in the performance of his duties with regard thereto * * *." It is not necessary that in making the assault petitioner had the specific intent to impede or obstruct the execution of the search warrant. See *Bray* v. *United States*, 289 Fed. 329, 331 (C.A. 4), which so interpreted a statutory forerunner of the instant statute. The words "with regard thereto" do not, as petitioner contends, require a different result. The phrase merely denotes that the assault must occur while the officer is engaged in attempting to execute the warrant, not that the purpose of the assault is to prevent service or execution of the warrant. See *United States* v. *Lombardozzi*, 335 F. 2d 414 (C.A. 2), certiorari denied, 379 U.S. 914; *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2), so construing 18 U.S.C. 111, which makes it an offense to assault or impede certain designated officials "while [they are] engaged in or on account of the performance of [their] official duties * * *." The difference in wording between 18 U.S.C. 111 and 18 U.S.C. 2231 plainly does not, as petitioner argues, suggest any substantial difference in the meaning of the two statutes, and petitioner is unable to cite anything in the legislative history of the statutes to support his claim.

The trial court, therefore, properly tracked the statute and required the jury to find that appellant assaulted, resisted or impeded the officers executing

the warrant, "while [they were] engaged in the performance of [their] duties with regard thereto * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973